U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

DATE: March 10, 1998

CASE NO. 97-INA-156

In the Matter of:

YAMAHA RESTAURANT,
Employer,

on behalf of

MANUEL M. CHAVEZ,
Alien.

Appearance: Suyen Hunter,
for Employer and Alien

Before: Burke, Vittone and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

The Employer filed an *Application for Alien Employment Certification* (ETA 750A) to permit it to employ the Alien permanently as a "Cook (Japanese Cuisine)." (AF 25-27). The ETA 750A specified that any U.S. worker for the position would need to have two years of

experience in the position. "Other Special Requirements" listed in the ETA 750A included the notation "No smoking/drinking in premises."

The Employer advertised the position with the notation "No smoke/drink." There were no responses to the advertisement.

Upon receipt of the record from the State job service, the Acting CO issued a Notice of Findings (NOF) in which she proposed to deny the application on the basis that the Employer's advertisement for the position resulted in an inadequate test of the labor market and demonstrated a lack of good faith recruitment in violation of §§656.21(g) and 656.21(b)(6) of the regulations (AF 19-23). The Acting CO found, in pertinent part:

> The text of the advertisement was also deficient because it merely informs U.S. Workers 'No smoke/drink.' While it is understandable there would be no drinking, it is quite unusual the (sic) a job advertisement would make such a statement. The vast majority of job advertisements make no such declaration; thus, the potential job seeker is faced with a rather curious and unsettling advertisement. Such language can tend to put off potential applicants and should not be stated in the job advertisement because it is so peculiar and out of the norm. Therefore such a reference should be deleted from both the job offer, and advertisement.

(AF21 emphasis original). The Acting CO went on to criticize the advertisement because it tells a potential job applicant who happens to be a smoker that he or she need not apply and because:

> The referenced language as stated either in the job offer or the advertisement does not normally appear as requirements either for the petitioned occupation or any other occupations for that matter. The prohibition on smoking and drinking are well established in the American workplace. No doubt this is why job announcements and advertisements omit such references.

The Employer was admonished to concentrate its efforts on an adequate and good faith labor market test, and not engage in behavior which appears calculated to discourage U.S. workers. Accordingly, the Employer was instructed to take the following required corrective action:

> The employer must delete the referenced language from the job offer because it has been utilized to discourage otherwise qualified U.S. workers from applying for the job opportunity.
>
> To delete the questionable language and retest the Labor Market:
>
> To delete the questionable language, the employer must submit a signed statement, in duplicate, to this effect.

> In addition, the employer must state that it is willing to retest the labor market with its revised requirements, as directed in this Notice. Failure to indicate willingness to readvertise will result in a denial of the employer's application. The employer should also submit a draft advertisement, reflecting the amended job duties and/or requirements.
>
> After receiving the employer's amendment to the ETA 750A and draft advertisement, this office will return the application to the Employment Service. The Employment Service will contact the employer with recruitment instructions. **DO NOT PLACE ADVERTISEMENTS UNTIL THE EMPLOYMENT SERVICE ADVISES YOU TO DO SO!**

(AF 21-22 **emphasis original**)

The Employer responded to the NOF with the following letter:

> Please find this letter to act as a request of approval of a recruitment notice as it has been requested on the 'Notice of Findings' dated March 5, 1996.
>
> We contacted ... the specialist who originally was handling this case and she advised us to send a new and corrected ad proposal to your Department to be reviewed. Deleting the requirements of No drinking as it was requested by your Department. Please delete MA-750-A, item #15, NO DRINKING.[1]

The Acting CO then issued a Final Determination denying certification. The CO found that the Employer had not taken the corrective action called for in the NOF for the following reason:

> In response to the NOF, employer deletes 'no drinking' from the job offer and advertisement. But without any rebuttal argument or acceptable explanation, the employer's job offer retains violative (sic) language in the form of 'No Smoking on Premises.' However, the NOF requires deletion of the referenced language from the job offer because it has been utilized to discourage otherwise qualified U.S. workers from applying for the job opportunity.

The Employer has requested a review of the denial and the record has been submitted to the Board for such purpose.

DISCUSSION

[1]Although the letter indicates that it was accompanied by a proposed new advertisement, no such evidence was included in the record transmitted to the Board.

The denial of the application in this case was founded on §§656.21(g) and 656.21(b)(6) of the regulations. Section 656.21(g) requires an employer to place an advertisement for the job opportunity which must include, *inter alia*, a statement of the employer's minimum job requirements. Section 656.21(b)(6) provides:

> If U.S. workers have applied for the job opportunity, the employer shall document that they have been rejected solely for lawful job-related reasons.

Initially, we noted that as there were no applicants for the position, and thus no rejection of U.S. workers, §656.21 (b)(6) cannot be used as a basis for the denial of the application.[2]

Further, the Acting CO did not find the Employer's special requirement of "No smoking/drinking on the premises" as being unduly restrictive. To the contrary, she appears to acknowledge that such restrictions are "well acknowledged in the American workplace."[3] Furthermore any such finding would necessitate the Employer's being given the opportunity to show a "business necessity" for the requirement.

The problem in this case is not that the Employer had inserted the requirement in the ETA 750A but that it was misstated in the advertisement for the position by omission of the qualifier "on the premises." As a result, the advertisement gives the impression that the Employer is seeking an employee who does not smoke or drink either on or off of its premises. Advertisements which offer terms and conditions less favorable than those listed on the ETA 750A violate §656.21(g) as they fail to correctly specify the employer's actual minimum requirements for the position.

Nevertheless, the Final Determination indicates that the Employer offered to readvertise the position and had sought approval from the Acting CO of an advertisement which reportedly included the requirement of "No smoking on the premises." Irrespective of whether such special requirement does or does not usually appear in job advertisements, it does not violate §656.21(g). Nor can it be said to discourage U.S. workers from applying for the position as it merely states an unchallenged job requirement, one that prospective employees may reasonably anticipate, i.e., that smoking will not be permitted in the place of employment.

Under such circumstances, the Acting CO erred in issuing a Final Determination denying

---

[2]The Acting CO cited §656.21(b)(6) in support of her finding that there had been a lack of "good faith recruiting" in this case. While the Board has held that a "good faith" requirement in regard to post-filing recruitment is implicit under such regulation, *H.C. LaMarche Enterprises, Inc.*87-INA-607 (Oct. 27, 1988) such requirement has been imposed by the Board under §656.21 (b)(6) only where there have been U.S. applicants, e.g., under circumstances where there has been a failure to interview or timely contact an apparently qualified U.S. worker.

[3]It is also a matter of law in many jurisdictions including the State of California.

certification. Consequently, this matter must be remanded to permit the Employer to retest the labor market with an advertisement which includes the language "No smoking on the premises."

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for the corrective action set forth above.

For the panel:

_____

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1)n when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.